APPENDIX A

Opinion of Supreme Court of New Jersey (20 N. J. 76, Sup. Ct. 1956)

On appeal from the Union County Court, Law Division.

Mr. Morton Stavis argued the cause for appellant (*Mr. J. Mercer Burrell,* attorney).

Mr. Chester A. Weidenburner, Assistant Prosecutor of Union County, argued the cause for the State (*Mr. H. Russell Morss, Jr.,* Prosecutor, and *Mr. Hyman Isaac,* Assistant Prosecutor, attorneys).

The opinion of the court was delivered by

WACHENFELD, J. The principal issue in this appeal is whether, on the record before us, it "clearly and convincingly appears" that the verdict of "guilty" returned by the jury was so contrary to the weight of the evidence as to be "the result of mistake, partiality, prejudice or passion." See *R. R.* 1:5-1(*a*).

The indictment charges that on January 30, 1953 in Westfield, Union County, the defendant had carnal knowledge of the complaining witness forcibly and against her will. From the judgment of conviction the defendant appealed directly to this court, we having granted certification in advance in view of the relationship between the instant case and *State* v. *Landeros,* 20 *N. J.* 69 (decided November 21, 1955).

The complaining witness at the time of the attack was a girl 19 years of age and 21 at the time of trial. The rape itself was established by her uncontradicted testimony, corroborated by a physician who examined her shortly thereafter.

The guilt or innocence in this case, as it so often does in this classification, hinges almost solely on the identification of the defendant as the perpetrator of the crime.

The following is a synopsis of the testimony for the State and the defense.

The complaining witness testified that at approximately 10:15 P.M. on the evening of January 30, 1953 she, unaccompanied, left a soda parlor and was walking on Broad Street, Westfield, in the direction of her home. She observed a colored man approaching, about 5 feet 8 in height, wearing a "bee-bop" hat, a short, close-fitting jacket and light pants. He was wearing old shoes and the collar of his jacket had markings across the front.

As she passed him she became "kind of frightened" and started to go off the sidewalk. He walked past but whirled around, grabbed her, placing his hand over her face, and dragged her about 100 feet into a vacant lot. He demanded money of her and after she gave him what money she had, he then proceeded to commit the rape. The lurid details will be omitted.

She had an opportunity to observe her assailant's face when he was perpetrating the crime and noticed he had a mustache. She observed his hand and noticed he was wearing a double-banded wedding ring. At the trial she unhesitatingly and definitely identified the defendant as the man who had committed the attack.

On cross-examination it developed she had seen the defendant on two occasions after the attack, the first on February 3, 1953—four days later—when she was taken by Westfield police to Belle Mead, where the defendant was employed. There she failed to identify him as her assail-

ant. She was unable to recall the details of that confrontation but acknowledged she had felt his hands and observed he wore a wedding ring.

Concededly, her testimony as to the Belle Mead incident was vacillating and uncertain and undoubtedly affected her credibility in so far as her identification of the defendant was concerned. Thus, she testified that at Belle Mead she had recognized the defendant's voice as that of her attacker and had communicated this fact to the police officers who accompanied her. Subsequently she reversed herself in this respect and said she had not given any indication to the police officers that she could identify the defendant but attempted to say she had communicated this information to a friend, which testimony was, of course, stricken.

She next saw the defendant on March 9, 1953 at the police station in Rahway. He had been taken into custody the day before in connection with an attack upon another woman and the Rahway police had sent out a teletype saying they had in their custody a man who had been arrested for attempted rape. The complaining witness was taken to the Rahway jail by Westfield police officers, where she immediately recognized and positively identified the defendant as he was led down a hall toward her.

Detective Duelks of the Westfield Police Department, who accompanied the complaining witness to Rahway, testified the identification was made of the defendant while he was standing five feet away from the complaining witness and the defendant did not attempt in any way to deny the accusation but remained silent.

With the exception of the testimony of the physician who attended the complaining witness, this comprises practical-

ly all of the evidence produced by the State in its effort to prove the allegations in the indictment.

The defense was an alibi. The defendant testified that on the night in question he was working at Ronnie's Garage in Scotch Plains welding manifolds for racing cars. He was there from approximately 7 P. M. until after 11 P. M. that night. He was regularly employed at Belle Mead and had a second job cleaning offices in a building, but on the night in question he was working in Ronnie's Garage under an arrangement whereby the garage owner permitted him to repair his own automobile in return for which he put in the same number of hours working on automobiles for the owner.

The defendant's alibi was supported by three witnesses, John Rogerson, Louis Yanotta and Michael Fiore. They were all working in Ronnie's Garage on the night in question and testified the defendant was there working on cars during the entire evening and did not leave until 11 P. M. These witnesses had known the defendant for only a period of two weeks prior to the incident itself and each described a reason for his ability to recall the night in question.

Rogerson was entered in a race at Kingsbridge Armory the following evening, January 31, which was a Saturday. He recalled the defendant on Friday night, January 30, helping him get his car ready for the race.

Yanotta testified January 30 was his birthday and he had taken a piece of birthday cake to the garage, giving it to one of his friends. He likewise said the defendant was at the garage until 11 P.M.

Fiore recalled the incident of the birthday cake and corroborated the other witnesses.

A fourth witness, the garage owner, was not present on the night in question. He testified that through his manager arrangements had been made with the defendant whereby he would be permitted to use the garage and that his manager had made a report on the basis of which the witness made an entry in his books as follows: "Landeros, OSL 26-30 repairs to racer body and exhaust, to repay by use of shop for repairs on Chrysler." He said the numerals "26-30" referred to the dates January 26 through January 30. Clark, the manager, who was supposed to have been present on the night of January 30, was not called because he could not be located.

As to the confrontation at Belle Mead, the defendant testified he was called from his work to meet the complaining witness. He was asked whether he spoke any Spanish or Portuguese and if he walked with a limp, both of which he answered in the negative. He was asked to hold out his hands and the complaining witness rubbed them, a fact which she confirmed in her testimony. He was then asked whether he had an Air Force jacket with a fur collar and he replied he did not but that he had a Navy foul weather jacket. He was sent to get the jacket and returned, put it on and walked up and down in front of the complaining witness. He said she shook her head and said, "No," indicating he was not the man.

Concerning the Rahway identification, he testified he was brought into a room where the complaining witness was and one of the detectives pointed to him and said: "That's the man, isn't it?" to which the complaining witness replied, "Yes." He admitted his silence following this identification but explained it by saying he was not asked to participate in any conversation between the complaining witness and the police officers and nothing was asked of him.

The case was submitted to the jury under a charge to which not only was no objection taken by the defendant but which consisted in major part of requests submitted and in the language employed by him.

The defendant's counsel now urges:

> "The defendant in this case was found guilty upon uncorroborated identification testimony, so contradictory, so impossible of belief, that it cannot possibly be a legally competent foundation for convincing a jury beyond a reasonable doubt."

To support this view, the defendant points principally to the testimonial contradictions of the complaining witness respecting the Belle Mead confrontation and her failure to identify the defendant on that occasion; the omission of any reference to a mustache in the description of the assailant entered upon the Westfield police blotter immediately after the attack, where as the defendant in fact has a very prominant mustache; the misdescription of the defendant as being 5 feet 6 inches in height in the police blotter entry whereas the defendant actually is 5 feet 10 inches; the complaining witness' misdescription of the jacket worn by her assailant, *i. e.*, that it had markings across the front whereas the jacket offered in evidence by the State had no markings in that location; and the complaining witness' testimony that her assailant spoke in a foreign language whereas the defendant does not.

Stressing these as weaknesses and variations in the complaining witness' testimony not evident in the defendant's corroborated alibi, the defendant insists he comes within the purview of *R. R.* 1:5-1(*a*) entitling him to a new trial.

But the power of an appellate tribunal to reject the findings of a jury is subject to limitations. In the first

instance, we may not interfere with the constitutional right of trial by jury by weighing the evidence and substituting our judgment for that of the jury. *Hager* v. *Weber*, 7 N. J. 201, 210 (1951); nor may we set aside a verdict merely because, in our opinion, we or the jury upon the same evidence might have found otherwise, *Boesch* v. *Kick*, 97 *N. J. L.* 92, 97 (*Sup. Ct.* 1922); *VanPelt* v. *Hartough*, 31 *N. J. L.* 331, 335 (*Sup. Ct.* 1865); *Hager* v. *Weber*, *supra;* so long as "a verdict * * * rests upon testimony competent to sustain the inference implied in such a finding [it] is ordinarily conclusive" upon us, *Hager* v. *Weber*, *supra;* for "our review upon appeal is aimed only at correcting injustice resulting from obvious failure by the jury to perform its function," *State* v. *Haines*, 18 *N. J.* 550, 565 (1955), and the error of the verdict must appear to us as an "inescapable conclusion," *Hager* v. *Weber*, *supra.*

All of these expressions have the same general meaning and are merely crystallized in the present statement of *R.R.* 1:5-1(*a*) that:

> "A verdict of a jury shall not be set aside as against the weight of the evidence unless it clearly and convincingly appears that the verdict was the result of mistake, partiality, prejudice or passion."

After careful consideration of all of the evidence and every aspect of the defendant's contention, we are satisfied that on the record we should not, within the limitations upon our appellate function as enumerated and outlined above, set aside the verdict against the defendant in the case *sub judice.*

The trial court, at the defendant's insistence, specifically charged that in considering the weight to be given to the alleged identification of the defendant by the complaining

witness it "must consider her prior failure to openly identify the same defendant at Belle Mead Depot * * *." It likewise charged:

> "The jury must weigh and consider all the evidence, including any contradictions and inconsistencies in the evidence, including the question of identification and the weight of such identification, and if the jury, after considering and weighing all the evidence, is not satisfied beyond a reasonable doubt that the complaining witness has identified the defendant as her attacker accurately and truthfully, he should be acquitted."

Thus, the same contentions made here by the defendant were submitted to the jury in the very language selected by the defendant for the jury's consideration in determining the factual equation.

The complaining witness, in open court, with full knowledge of the consequences of her act, definitely and positively identified the defendant as her assailant. The extent to which her testimony should be believed, taking into account all the factors enumerated which may have a tendency to raise some aura of doubt, was, we believe, properly a question for the jury and we find no justification in the record or under our rule for substituting our judgment for theirs.

Counsel for the defense and the prosecutor of the pleas, evincing firm faith in their respective beliefs, in a rather unusual procedure consented to our going outside of the record in an effort to find further light by examining documentary material which was subsequently offered as having some bearing upon certain disputed questions of fact relating to the issues presented to the jury. This material, although helpful, had no persuasive significance in our ultimate determination.

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Finally, it is urged error was committed in the admission of Detective Duelks' testimony that the defendant said, "Nothing," when in his presence and within his hearing he was identified by the complaining witness at the Rahway Police Station, and in the failure of the court to charge the jury as to the weakness of this type of evidence as an admission by the defendant.

Evidence of the defendant's silence when accused of criminal activities, even where at the time the accusation is made he is in the custody of the police, is admissible. *State* v. *Lambertino*, 13 *N. J. Misc.* 687 (*Sup. Ct.* 1935); *State* v. *Claymonst*, 96 *N. J. L.* 1 (*Sup. Ct.* 1921); *State* v. *Rosa*, 72 *N. J. L.* 462 (*E. & A.* 1905); *State* v. *D'Adame*, 84 *N. J. L.* 386 (*E. & A.* 1913); *Donnelly* v. *State*, 26 *N. J. L.* 601, 613 (*E. & A.* 1857); *State* v. *Sorge*, 125 *N. J. L.* 445 (*E. & A.* 1940).

In so far as the court's charge is concerned, the defendant made no request to charge as to the weakness of the "admission" evidence and did not object to the charge as given. There was no obligation, under these circumstances, on the part of the trial court to charge specifically with reference to this testimony inasmuch as it was clearly established that the defendant heard the accusation when it was made.

The judgment of conviction below will be affirmed.

For affirmance—Chief Justice Vanderbilt, and Justices Wachenfeld, Jacobs and Brennan—4.

For reversal—Justices Heher, Oliphant and Burling—3.

APPENDIX B

Mandate of Affirmance by Supreme Court of New Jersey of Judgment of Conviction of Union County Court, New Jersey

This cause having been duly argued before this Court by Mr. Morton Stavis, counsel for the appellant and Mr. Chester A. Weidenburner, Counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Union County Court is affirmed with costs; and it is further ordered that this Mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Union County Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 21st day of November, 1955.

/s/ JOHN H. GILDEA
Clerk of the Supreme Court

A TRUE COPY
/s/ JOHN H. GILDEA
Clerk

FILED
Nov 21 1955

John H Gildea
Clerk

APPENDIX C

Order of Supreme Court of New Jersey Denying Petition for Rehearing

This matter having been duly presented to the Court, and no justice who voted with the majority having moved for a reconsideration, it is ordered that the petition for rehearing is denied.

Witness, the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton, this nineteenth day of December, 1955.

/s/ JOHN H. GILDEA
Clerk

FILED
Dec 19 1955

John H. Gildea
Clerk

A TRUE COPY
/s/ JOHN H. GILDEA
Clerk

APPENDIX D

New Evidence Admitted to Record on Approval of Motion to Enlarge the Record

(The documents appearing in Appendix D were included in the record as a result of an order of the Supreme Court of New Jersey granting the petitioner's motion to enlarge the record.)

1. Order of Supreme Court of New Jersey Granting Motion

This matter having been duly presented to the Court, it is Ordered that the motion to enlarge the record is granted.

Witness, the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton, this twenty-seventh day of June, 1955.

JOHN H. GILDEA
Clerk

Filed June 27, 1955

2. Two photographs

New Evidence Admitted to Record on Approval of Motion to Enlarge the Record

3. Police Records of Physical Description of Petitioner Made March 11, 1953

Bureau of Identification

Office of the Sheriff, County of Union, Elizabeth, N. J.

Name Albert H. Landeros Bur. No. 21502

Alias Albert Hernan Landerous (cn)

Res. 12 Berkeley Terr., Plainfield, NJ

Born 7-22-26 Place Plainfield, NJ

Occup. Welder

Height 5-10 Weight 152 Build Med

Hair Blk Wvy Eyes Marn Comp. Lt. Bro. N

Marks Pock Marks; Cntr Fhd;

4. Teletype sent out by Rahway Police Department, March 9, 1953

"Newark N.J. 3699 Police Information 3-9-53 Arrested for Attempted Rape:

Albert Herman Landeros

12 Berkeley Terr., Plainfield, N.J.

Age 26 Colored 5'11" 156 lbs.

Slim Build Black Hair Brown Eyes

Brown Complexion

Attn. Cranford, South Plainfield & Westfield N.J.

PDS—Authority Rahway, N.J. P.D. (Advise any record or wanted)
0900 RAB-F BEHMNPUYK"

APPENDIX E

Extract from Petitioner's Reply Brief Raising Federal Constitutional Issue

We pointed out in our main brief (Db10-27 *et seq.;* Db32-34 *et seq.*) that Miss Stiles swore unequivocally that she recognized the defendant's voice at Belle Mead and communicated this recognition to the Chief and the Lieutenant of Police of Westfield (D27a-38, D31a-7, D31a-10).

We noted further that the State never called these superior officers as witnesses, despite the fact that their testimony was admissible for rebuttal purposes (Db33-1 *et seq.*) and that the legitimate inference of such failure to call the police officers is that, if produced, they would not have corroborated her testimony since otherwise their failure to arrest the defendant is inexplicable (Db32-27 *et seq.*). And we emphasized the inevitable conclusion that the police and the prosecution know more than has yet been revealed as to what really happened at Belle Mead (Db34-10) and that the truth is unfavorable to Miss Stiles' subsequent identification of defendant as the assailant.

The State's reply to this (Pb9-2 *et seq.*) is most revealing:

> "Defendant attacks the absence of any confirming testimony by police officers of that of the complaining witness with respect to her recognition of defendant at Belle Mead and her disclosure of that recognition (Db10-27-37, Db11-1-16). It must be noted that defendant was free at trial to cross examine into these

Extract from Petitioner's Reply Brief Raising Federal Constitutional Issue

> matters and thus lay proper foundation for rebuttal witnesses by propounding questions as to the persons to whom these disclosures were made, to whom the assailant was described, the substance of the description, and other related questions. The State enjoyed no such liberty at trial in this regard, for such questioning would have been subject to objection because of its impeaching character. *State* v. *Young, 93 N. J. L. 396 (E. & A. 1919); State* v. *Cooper, 10 N. J. 532 (1953).*"

We assume the State means what it says in its brief, and if so the State seems to concede that it has information as to what actually occurred at Belle Mead which would destroy Miss Stiles' story.

The testimony of the police officers would either *corroborate* or *impeach* Miss Stiles' testimony. If it would have corroborated it, the testimony would have been admissible by way of rebuttal. If it would have impeached it—and the State insists in its brief that such would have been the effect of the testimony—then was not the jury—and is not this Court—entitled to know the truth? Shall this defendant languish in jail on the basis of a false presentation of his case—when the State knows the truth to be something different from what was told to the jury?

The State's position seems to be that it is not the duty of the prosecution to disclose contradictory statements it knows its chief witness has made to others; and that such evidence, uncontradicted by evidence in its own possession and, in fact, deliberately suppressed, takes on the element of finality if it "gets by" and is accepted by a jury kept in ignorance of the true facts.

Extract from Petitioner's Reply Brief Raising Federal Constitutional Issue

Such is not our concept of justice or of the function of the prosecution, e.g., *Berger* v. *United States, 295 U. S. 78, 88 (1934)*; *State v. Orecchio, 16 N. J. 125, 140-141 (Sup. Ct. 1954)*.

Moreover, nondisclosure by the prosecution of pertinent facts in its possession which may establish or help to establish the innocence of the defendant constitutes a flagrant denial of due process of law, requiring reversal of this conviction. Thus, in *Pyle v. Kansas, 317 U. S. 213 (1942)*, the Supreme Court reversed a conviction on the grounds, *inter alia,* that the State deliberately suppressed testimony favorable to the defendant. Such too is the law in our State, *State v. Cooper, 2 N. J. 540, 554 (Sup. Ct. 1949)*. [Emphasis supplied in this appendix]

APPENDIX F

Extract from Petitioner's Mimeographed Supplementary Memorandum Raising Federal Constitutional Issue

With the police records now before the Court we at last have the explanation for the statement in the brief of the prosecutor that (Pb9-2 *et seq.*):

> "Defendant attacks the absence of any confirming testimony by police officers of that of the complaining witness with respect to her recognition of defendant at Belle Mead and her disclosure of that recognition (Db10-27-37; Db11-1-16). It must be noted that defendant was free at trial to cross examine into these matters and thus lay proper foundation for rebuttal witnesses by propounding questions as to the persons to whom these disclosures were made, to whom the assailant was described, the substance of the description, and other related questions. The State enjoyed no such liberty at trial in this regard, for such questioning would have been subject to objection because of its *impeaching character.*" (Emphasis supplied.)

But however the prosecution may have ignored its responsibilities at the trial not to withhold facts which established the falsity of the testimony there presented (cf. our reply brief, Db2-5 to Db3-3), this Court should correct this grave error.

Our system of justice does not permit a conviction to stand under circumstances where the prosecution deliberately suppresses evidence favorable to the defendant. See

Extract from Petitioner's Mimeographed Supplementary Memorandum Raising Federal Constitutional Issue

Pyle v. *Kansas*, 317 U. S. 213 (1942); *State* v. *Cooper*, 2 N. J. 540, 554 (Sup. Ct. 1949).

We respectfully submit that had all the facts of this case been known to the lower court, a judgment of acquittal was indicated. But, certainly, the least that can be said was that the jury should have had all the facts, and that a verdict based upon deliberate withholding of the decisive facts now before the Court cannot stand.

APPENDIX G

Extract from Petition for Rehearing Raising Federal Constitutional Question

ARGUMENT

POINT I

The defendant was denied due process of law under the Fourteenth Amendment of the Federal Constitution and Article I, Par. 1 of the Constitution of New Jersey by a conviction based upon testimony known by the law-enforcement arm of the government to have been false and under circumstances where evidence favorable to the defendant was knowingly suppressed by law-enforcement officers.